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In The

Supreme Court of the United States

October Term 1996

CLINTON TRIMIEW,

Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SUPREME COURT OF VIRGINIA

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. DID THE VIRGINIA SUPREME COURT IMPROPERLY REVERSE THIS FELA JURY VERDICT BY FINDING THE WORKER GUILTY OF ASSUMING ROUTINE WORKPLACE RISKS IN VIOLATION OF 45 U.S.C. §54 AND THIS COURT'S CONTROLLING DECISIONS?

II. DID THE VIRGINIA SUPREME COURT MISAPPLY THE STANDARDS OF APPELLATE REVIEW AND MISINTERPRET THE RECORD TO REACH A RESULT INCONSISTENT WITH THE FEDERAL LAW GOVERNING CLAIMS BY INJURED RAILROAD WORKERS?

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PETITION FOR WRIT OF CERTIORARI

Clinton Trimiew respectfully petitions the United States Supreme Court to issue a Writ of Certiorari to review a State Court decision which directly violates a central provision of the Federal Employers' Liability Act (hereafter "FELA"), 45 U.S.C. §54, as well as this Court's decisions related to application of this federal statute, including that in Tiller v. Atlantic Coast Line Railroad Company, 318 U.S. 54 (1943).

OPINIONS BELOW

The opinion of the Virginia Supreme Court, Norfolk Southern Railway Co. v. Trimiew, 253 Va. 22, 480 S.E.2d 104 (1997), is reprinted at Appendix pages 1-9. The order on the plaintiff's jury verdict is reprinted at Appendix pages 14-15, and the trial court's opinion from the bench denying Norfolk Southern Railway Company's motion for new trial and/or to set aside the verdict is reprinted at Appendix pages 11-13 (hereafter "App.").

JURISDICTION

The opinion of the Virginia Supreme Court, entered on January 10, 1997, decides an issue arising under the statutes of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

I. United States Constitution - Amendment VII

In suits at common law, where the value in controversy shall exceed Twenty Dollars ($20.00), the right

of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

II. 45 U.S.C. §51 - Liability of Common Carriers By Railroad ... for injuries to employees from negligence ... .

Every common carrier by railroad while engaging in commerce ..., shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce..., for such injury or death resulting in whole or in part from the negligence of...such carrier, or by reason of any defect or insufficiency, due to its negligence, in its...track, roadbed, ...or other equipment.

III. 45 U.S.C. §54 - Assumption of risks of employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries..., such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier....

IV. **Virginia Supreme Court Rule 1:4 - General Provisions as to Pleadings.**

* * * * * * *

(d) Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense.

* * * * * * *

V. **Virginia Supreme Court Rule 3:16 - General Provisions as to Pleadings.**

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(b) An allegation of negligence...is sufficient without specifying the particulars of the negligence.

* * * * * * *

VI. **Virginia Supreme Court Rule 5:25 - Questions to be Considered.**

Error will not be sustained to any ruling of the trial court...for which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this court to attain the ends of justice.

* * * * * * *

VII. **Virginia Code §8.01-377 (1950, as amended) - Remedy when variance appears between evidence and allegations.**

If, at the trial of any action, there appears to be a variance between the evidence and the allegations or recitals, the court, if it considers that substantial justice will be promoted...may allow the pleadings to be amended,...as it may deem reasonable....

STATEMENT OF THE CASE

Procedural History

Clinton Trimiew (hereafter "Trimiew") filed this action against his employer, Norfolk Southern Railway Company (hereafter "the Railroad"), on February 27, 1995 in the Richmond Circuit Court in Richmond, Virginia. Trimiew's suit alleged the Railroad failed to provide him a safe place to work under 45 U.S.C. §51 (the FELA), and failed to warn him of certain dangers, among other allegations of negligence. [App. at 16-19]. On December 8, 1995, a jury awarded Trimiew a $500,000.00 verdict as a result of a workplace injury which had caused him painful back surgery, permanent disability, and rendered him unable to bend to tie his own shoes.

The Railroad claimed the verdict was excessive and that no negligence had been shown in its post-trial motion.[1] The trial court denied the Railroad's post-verdict motions on December 19, 1995.

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[1] Negligence evidence was solid enough that defendant never moved for summary judgment pre-trial, nor moved to strike the evidence as insufficient at the close of plaintiff's evidence or at the close of all the evidence at trial. The first challenge was raised after the adverse verdict.

The Railroad appealed to the Virginia Supreme Court (hereafter "VSC") which accepted the appeal solely on the question of the sufficiency of evidence of negligence. On January 10, 1997, the VSC's opinion re-examined the evidence and held that both the trial court and jury were in error because the evidence of the Railroad's negligence was insufficient to support the verdict in the VSC's estimation. The VSC reversed the jury's verdict and ordered final judgment for the Railroad.

Trimiew's Statement of Facts

On August 20, 1993, Trimiew, a railroad laborer, suffered serious injury on the job as he dismounted from a vehicle, called a "high rail" truck, which runs down the tracks of the railroad. [App. at 76-77, 84, 172]. He was working with his supervisor, Robert Forsythe, doing general maintenance of the railroad near Burkeville, Virginia. [App. at 86]. As Trimiew got out of the vehicle he was caused to fall by the movement of high mounds of ungroomed ballast rock onto which he had to step down. [App. at 88-89].

The ballast causing the fall was at or above the level of the rails on which the train runs, whereas the standard, usual level of such ballast was flat and level with the wooden railroad cross-ties. [App. at 90-95, 173]. Trimiew presented a diagram of the height of the ballast showing that it reached at least the height of the rail. [App. at 90, 170]. This formed a mound or berm of stone. [App. at 95-96]. Mounds of this height were not present at the few other locations where Trimiew and Forsythe stopped earlier the same day. [App. at 86]. Gang supervisor Stephen Palmer admitted that he knew there was "high ballast" in the area that Trimiew fell [App. at 118], and that it could have contributed to causing Trimiew's fall. [App. at 118]. The appearance of the ballast "looked safe" at the accident site but was ungroomed and loose,

rolling out from under Trimiew "like marbles." [App. at 88, 95].

The purpose of ballast rock is to give lateral support to the track and promote drainage. [App. at 39, 169]. It was well known to the Railroad that it was safer and easier for its workers to walk on flat and firm rock surfaces along the margin of its tracks than through high and loose mounds of such rock. [App. at 41, 45, 115, 135-36]. The Railroad foremen testified that normally the ballast lining the track margins was level with the wooden cross-tie, going outward six inches beyond the outside of the cross-tie, at which point the ballast rock normally sloped downward. [App. at 39-40]. Because high, loose, and ungroomed ballast is a well known danger, the Railroad had adopted detailed standard written procedures relating to unloading, grooming and maintaining same. [App. at 39-40, 115, 168, 169-70]. From the diagrams accompanying these written procedures, the standard profile for ballast in places such as where this accident occurred is level with the wooden cross-ties, not at or higher than the level of the rail on which the trains run. [App. at 115, 169-70].

This standard flat condition of the ballast could be deviated from to meet the goal of unloading the ballast before new cross-ties are unloaded as part of a T&S (timber and surfacing) project to repair the track. [App. at 39-40]. T&S operations to replace the cross-ties are relatively infrequent, only scheduled every eight (8) years on this track. [App. at 127-28]. Even when ballast trains dumped fresh ballast, company standards directed that the mounds be clear of rail switches and road crossings. [App. at 37, 168]. Normally, the loose freshly dumped ballast is returned to standard condition by a T&S crew within a month of unloading. [App. at 59].

These high mounds of ballast lining the track margins had been placed in anticipation of a T&S operation around March 1993, about five months before the injury, and had

not been maintained, used, or disturbed since. [App. at 34-35, 37-39]. Workers testified that the ballast dumping work in March 1993 was "unusual" because the ballast rock in the cars was frozen solid. [App. at 34-37]. Ernest Jones, foreman of the gang, testified that the fifty-four hopper car train should have spread stone over eight to twelve miles, but only spread the stone over a compressed five to six mile stretch of track, because of the frozen chucks, creating even higher than usual mounds. [App. at 57-59]. The result was that the Railroad left "big piles here, big piles there." [App. at 36].

Supervisor Palmer learned by April or May 1993 that the T&S operation, which was to use the dumped ballast, was cancelled altogether due to budget cutbacks. [App. at 116]. In fact, the Railroad knew in April of 1993 that the T&S crew was postponed for at least a year. [App. at 116]. The mounds of rock were allowed to remain beside this particular section of the railroad track for months, permitting the danger to be present at the time of Trimiew's injury on August 20, 1993.

A ballast regulator, used to flatten, groom, and tamp the rocks, or to plow the ballast back up into a mound, was located on a rail "side track" about three miles away from the Milepost 89 accident location. [App. at 32-33, 171]. Supervisor Forsythe admitted that the ballast regulator located on the side track could have been used to smooth the ballast rock where Trimiew fell. [App. at 138-39]. Two of the Railroad's ballast regulator operators testified it would take a single worker four to five hours to smooth or groom the entire five miles of ballast rock mounds surrounding Burkeville. [App. at 52, 65].[2]

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[2] In the Railroad's closing jury argument as well as in its oral argument to the VSC, the Railroad asserted that if such a ballast regulator smoothed or groomed the five miles of rock, that an entirely new ballast train and a mechanized T&S gang would be required to re-dump the rock at a later date. The VSC referred to this argument, never distinguishing

Plaintiff's suit also included the allegation at paragraph seven (7) that "defendant failed to inspect, find, and warn plaintiff of a dangerous condition; that defendant and its agents failed to issue appropriate warnings, violated their own standards as to the proper grooming and placement of ballast rock along the railroad line....[which caused Trimiew's] injuries." [App. at 17-18]. The first evidence presented by Trimiew at trial was two admissions by the Railroad as follows:

> That [the Railroad] admits that [the Railroad] maintains no written records, or written safety rule, which specifies how a worker's arms and legs are to be positioned prior to exiting from the cab of a "high rail" vehicle.
>
> That [the Railroad] has no written memoranda or documents which were distributed to, or conveyed to [Trimiew], detailing the manner in which [Trimiew] was required to dismount from the cab of a "high rail" vehicle, such as the one involved in the subject accident.

[App. at 23-24]. Trimiew's immediate supervisor admitted that the area where Trimiew was caused to fall was not an area that was walked by workers often, [App. at 139] and he and Trimiew had never together worked on foot at that exact

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that there was no evidence to support it. See 253 Va. at 28-29, 480 S.E.2d 109 (1997). This argument was inaccurate and likely was rejected by the jury which understood that the same ballast regulator machine that normally grooms the rock could plow the rock back up to its original location with a single worker on a four to five hour work assignment. In fact, the testimony on the point confirmed that the side arms or plows of the regulator can push the ballast away from the rail or pull it back up as needed. [App. at 32].

location before the date. [App. at 140]. Trimiew and his supervisor typically inspected 100 miles of track, [App. at 25, 82] and the high mounds extended over 5-6 miles only. [App. at 58-59]. There was no testimony that Trimiew was specifically warned on the day in question (or before) about the danger of loose and high ballast near Burkeville. The Railroad had never trained or instructed Trimiew how to dismount from the "high rail" vehicle, or into ungroomed mounds of rock. [App. at 23-24, 111-114].

REASONS FOR GRANTING THE WRIT

I. THE VIRGINIA SUPREME COURT MPROPERLY REVERSED THIS FELA JURY VERDICT BY FINDING THE WORKER GUILTY OF ASSUMING RISKS IN VIOLATION OF 45 U.S.C. §54 AND THIS COURT'S CONTROLLING DECISIONS.

(A) THE VIRGINIA SUPREME COURT GROUNDED ITS DECISION ON TRIMIEW'S ASSUMPTION OF RISK WHILE COUCHING ITS HOLDING IN TERMS OF "NON-NEGLIGENCE" OF NORFOLK SOUTHERN RAILWAY COMPANY.

In 1939, Congress abolished assumption of risk under the FELA. 45 U.S.C. §54. Barely four years later, in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 58 (1943) (hereafter "Tiller I"), this Court clarified that "every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment." The Court of Appeals had found the evidence insufficient to establish negligence, saying that the doctrine of assumption of the risk still applied, not as a defense, but to show non-negligence related

to "ordinary risks." Id. at 57. Reversing that ruling, this Court stated that Congress, by abolishing the defense of assumption of risk (the common law doctrine that the worker bore the risk of all dangers "normally and necessarily incident to his employment") did not mean to leave open the identical defense for the master by changing its name to "non-negligence." 318 U.S. at 56, 58.

On remand, the Fourth Circuit Court again tried to prevent a recovery claiming that no negligence was shown because the accident happened under circumstances not against railroad customs and rules, and because the circumstances had existed before and were known to the employee. Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574, 580 (1945) (hereafter "Tiller II"). However, while relying on the ordinariness of the danger and the familiarity of the circumstances to the employee to deny his claim of negligence, the Fourth Circuit Court carefully avoided relying on "assumption of the risk." See Atlantic Coast Line R. Co. v. Tiller, 142 F.2d 718, 722-23 (4th Cir. 1944). This Court again reversed the Fourth Circuit Court's failure to allow the jury to decide whether the circumstances constituted a violation of a railroad's broad duty to inspect the workplace for hazards and to warn workers of same. Tiller II, 323 U.S. at 580. This Court confirmed that the duty to warn may apply even if no railroad rule or custom prohibited the action or condition from occurring, and even if the worker is generally familiar with the dangerous condition from prior work activities. Id. In short, the Tiller line of cases stands for the concept that the Railroad has a duty to take reasonable steps to react to and to warn of even customary dangers.

Ignoring both statutory and decisional law, the VSC in this matter claimed that no negligence was proved because the condition causing the injury, ungroomed mounds of ballast rock lining roadbed walking areas, was "normal" and was familiar to workers like Trimiew from earlier work

activities. Norfolk Southern Railway Co. v. Trimiew, 253 Va. 22, 28-29, 480 S.E.2d 104, 108-09 (1997). The VSC interjected the abolished assumption of the risk issues into this case to substitute its judgment for the jury's verdict. The VSC's analysis was that because something is a customary danger, known to an employee, then there is no longer a duty of the railroad to warn about it or remove it.

The VSC included this key language in its holding:

> [T]he record is devoid of proof, lay or expert, that there was anything improper in the manner the ungroomed ballast was situated along the track..... [T]he ballast where plaintiff fell was at the normal height for ungroomed ballast..... [W]orkers like this plaintiff were fully aware of the normal condition of ungroomed ballast from long railroad experience and from participating in unloading the very ballast upon which the plaintiff fell; they knew that ungroomed ballast was "difficult" to walk upon. Thus, given these facts, there was no basis for the defendant to perceive that the ballast, laid in routine fashion for miles along the track in open country, posed an unreasonable danger to employees such as this plaintiff.

253 Va. at 28-29, 480 S.E.2d at 108-09 (emphasis added).

In so holding, the VSC ignored the evidence the jury heard. First, the jury may have reasonably determined that: it was negligence to simply dump the rock and to require Trimiew to do his regular work in the ungroomed rock, without having been warned or instructed. Perhaps the jury concluded the Railroad should have placed temporary warning signs along the five miles of track; or supervisor Forsythe should have warned Trimiew as he stopped the

"high rail" truck, or the Railroad should have used the ballast regulator machine for the four to five hour assignment to groom the ballast back to standard height, or the railroad should have instructed Trimiew about how to dismount from the vehicle in mounds of ballast rock. Thus, the danger posed by high, loose stone is the type of danger that could be avoided under the circumstances. See Tiller I, 318 U.S. at 72 (Frankfurter, J. concurring).

When this court reversed the Fourth Circuit Court of Appeals in Tiller I, the discredited Fourth Circuit decision contained a factual analysis remarkably similar to that of the VSC:

> Tiller had been in the employ of the railroad company for sixteen years, and was familiar with the layout of the tracks...and with the operation of the cars and the make-up of the trains. It follows that the case presents no exception to the rule concerning the duty of railroad employees and freight yards to look out for their own safety....

128 F.2d at 421-22. Likewise, the second overturned Fourth Circuit opinion in the Tiller line has language very similar to the VSC's here ("the same movement [as that causing Tiller's death] had been performed...on other occasions and...the track was in general use"). Tiller II, 142 F.2d at 722-23.

In grounding its decision on the concept of assumption of risk, the VSC, just as in the Fourth Circuit's second Tiller decision, camouflaged its decision under the guise of "non-negligence" of the railroad. However, this Court obliterated every vestige of assumption of risk over fifty years ago and rejected court efforts to mask a holding in terms of "non-negligence." Here, the Railroad had long standing knowledge of the danger of ungroomed ballast,

generally, and these mounds specifically. Instead of accepting that this evidence showed the extent of the Railroad's negligence, the VSC assumed that this same evidence supported a finding of "non-negligence" because the danger was one regularly created. This is the essence of "assumption of risk."

Even though it was conceded by the Railroad that ungroomed rock was a known difficult walking surface, the VSC tried to liken high ungroomed ballast rock to a "normal condition" and "a known condition," and then even suggested that the Railroad could never spread ballast for "fear of being found liable for an employee's injuries." Trimiew, 253 Va. at 28-29, 480 S.E.2d at 108-09. The evidence showed this was a danger, and not the usual condition of the ballast and track, even if the danger was periodically present. There was testimony that this was a particularly unusual frozen unloading, that was only supposed to be present for a short time, until the T&S crew smoothed it. The jury could find it was not an everyday situation and was unexpected to Trimiew.

The true standard under the FELA is whether a reasonably safe work place was provided, and under familiar principles the Railroad had a duty to inspect and warn plaintiff of even accustomed dangers. The VSC interpretation of a railroad's duties purports to apply to any "routine maintenance operation" and turns the FELA's mandates nearly upside down. Every day of the year, thousands of railroad maintenance workers in the United States are doing "routine maintenance," and many of these routine activities are dangerous. The VSC's decision would mean railroads are free from FELA liability, even the duty to warn, if these jobs involve routine and accustomed dangers.

(B) THE RAILROAD IS NOT BEING PENALIZED FOR ROUTINELY MAINTAINING ITS TRACK, BUT RATHER FOR REQUIRING WORK "ON FOOT" ON HIGH LOOSE BALLAST WITHOUT WARNINGS, PRECAUTIONS OR INSTRUCTIONS.

Trimiew had a duty to prove a dangerous condition and he did so, which was never really contested by the Railroad. Notice was not an issue since the Railroad actually created the dangerous walking surface in March, 1993. See Harp v. Illinois Central Gulf R.R. Co., 370 N.E.2d 826, 828 (Ill. App. 1977) (where railroad created the dangerous condition it is charged with actual knowledge). The Railroad's duty to inspect and warn under the FELA is well settled, and Trimiew proved notice and a failure to warn him of the long known condition. Despite the strong evidence, the VSC was on a clear "search to reverse" mission and did not meaningfully acknowledge that FELA is a broad remedial statute, under which this court has adopted a "standard of liberal construction in order to accomplish [Congress'] objects." Urie v. Thompson, 337 U.S. 163, 180 (1949).

Rather than applying the broad remedial principles underlying FELA, the VSC closely affiliated itself with a railroad's "fear" of conducting a "routine maintenance project" without being held liable by an injured worker. See Trimiew, 253 Va. at 29, 480 S.E.2d at 109. Not only is this far afield from proper appellate review of the facts of this particular case, it totally misconstrues the issue of negligence. The Railroad was not required to have Trimiew work in the five miles of ungroomed ballast--it had a choice to close that section to general "walking" maintenance work until the section was groomed by rail machinery.

By its express terms, the FELA, 45 U.S.C. §51, extends a railroad's potential negligence liability to "any defect or insufficiency" in its "track" or "roadbed," in no manner delineating between open country, rail yards or remote locations. Indeed, ungroomed ballast has often been the basis of FELA liability. In Atlantic Coast Line R.R. Co. v. Gunter, 229 F.2d 842 (5th Cir. 1956), the railroad had dumped ballast between ties and had not tamped or leveled same. The plaintiff rail switchman was performing his usual duties when he was injured due to the loose and rolling ballast rock. 229 F.2d at 843. In Gunter, as in this case, the railroad denied any negligence and asserted it was simply maintaining its track in accordance with good engineering practices. The Fifth Circuit declared:

> It is true enough that the evidence establishes that there was nothing wrong in ballasting the roadbed for use as main line tracks...but it is also true that this portion of the track was still being used as a part of the yard, and switching operations were going on over it, operations which require the switchmen to alight from moving trains and obligating the company to use reasonable care to furnish a reasonably safe footing for such alighting.

Id. at 844. Accordingly, the Fifth Circuit affirmed a jury verdict for the plaintiff. Id; see also Hahn v. Norfolk and W. Ry. Co., 375 N.E.2d 914 (Ill. App. 1978) (Worker slipped on loose ballast, jury verdict affirmed); Harp, 370 N.E.2d 826 (Court affirmed plaintiff's jury verdict for a rail worker who slipped on loose and unpacked ballast which looked secure before plaintiff fell).

In FELA cases "there has been an oscillation between the intent of the statute to impose such [broad and remedial] responsibility and the determination of a portion of the

judiciary to resist such imposition of liability on the outmoded argument that industry needs such protection to help it grow. Today American industry is full grown and should assume the cost of the human overhead as part of its adult responsibility." Richter and Forer, "Federal Employers' Liability Act," 12 F.R.D. 13, 35 (1951). Of course, rail workers injured or disabled on the job do not receive any wages or workers' compensation under the FELA unless some fault is proven, and this underlies the remedial purposes of the statute.

Thus, the Railroad is not in danger of being liable for all ungroomed ballast falls, nor all routine maintenance injuries, only those that under the totality of the circumstances should have been prevented by ordinary care. However, if the mistaken logic of the VSC is allowed to stand, no fall on ungroomed ballast could ever give rise to liability no matter how egregious the railroad's negligence in failing to warn or remove the danger.

II. THE VIRGINIA SUPREME COURT MISAPPLIED THE STANDARDS OF APPELLATE REVIEW AND MISINTERPRETED THE RECORD TO REACH A RESULT INCONSISTENT WITH THE FEDERAL LAW GOVERNING CLAIMS BY INJURED RAILROAD WORKERS.

(A) THE VIRGINIA SUPREME COURT INCORRECTLY APPLIED THE STANDARD OF EVIDENTIARY REVIEW TO A PLAINTIFF'S FELA VERDICT UPHELD BY A TRIAL COURT.

The difference between "search to reverse" appellate review and "seek to uphold" review is rather obvious. In FELA actions, this court has repeatedly held that only when there is a complete absence of probative facts to support the conclusion reached by the jury does reversible error appear. Dennis v. Denver and Rio Grande Western R.R. Co., 375 U.S. 208, 210 (1963) (per curiam); Lavender v. Kurn, 327 U.S. 645, 653 (1946). In the interest of preserving the U.S. Constitution's Seventh Amendment right to trial by jury, there inheres the general rule that the court should reconcile the jury's verdict if at all possible. Gallick v. B & O Railroad Co., 372 U.S. 108, 119 (1963). Once it is shown that railroad negligence played any part, even the slightest, in producing the injury, a jury verdict for the worker may not be upset on the basis of his own negligence, no matter how substantial it may have been, although the jury may, of course, take the employee's contributory negligence into account in arriving at its verdict. Dennis, supra, 375 U.S. at 210. Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. Tennant v. Peoria and P.U. Ry. Co., 321 U.S. 35 (1944). It is an undue

invasion of the jury's function for an appellate court to weigh conflicting evidence and witness credibility and arrive at a conclusion opposite from one reached by the jury. Lavender, 327 U.S. at 652-53; Tiller I, 318 U.S. at 67-68.

The VSC ignored the mandates of Dennis, Lavender, Tennant and Gallick, as outlined. There was no effort to reconcile or uphold. Trimiew's evidence of the Railroad's negligence was sufficient, and in many instances not even contested. The existence of ungroomed ballast is a known danger because it is difficult to walk on safely. The Railroad did not take reasonable steps to warn to prevent the injury. It failed to post warnings, bulletins or signs about the ungroomed ballast. The Railroad also could have instructed and warned Trimiew about dismounting into such dangerous conditions, which were not a familiar part of his general workday practices, as ballast train dumping occurred in advance of T&S gang work on a stretch of track only once every several years.

It could have taken further steps to prevent the injury, such as to have prohibited workers from dismounting for "on foot" tasks in the ungroomed ballast, or to have more promptly smoothed and groomed the ballast with a four to five hour work assignment. Denying the Railroad's motion for a new trial which claimed that "no negligence had been shown," the trial court succinctly stated as follows:

> [The negligence is a] combination of both putting the ballast down, leaving it in an unsafe condition no matter how long...[and] requiring Mr. Trimiew to do his job on that ballast....[a] hazardous condition created by the railroad.

[App. at 12].

Such basic proof of a danger, and negligence in reaction to same, was clear in the record, especially when all facts, and reasonable inferences therefrom, are looked at in the light most favorable to the plaintiff. It is hard to understand how the seven justices of the VSC could have concluded that the seven citizens of Richmond, Virginia all had no reasonable basis whatsoever for the verdict resulting from their deliberations.

(B) PLAINTIFF'S EVIDENCE REGARDING FAILURE TO TRAIN AND INSTRUCT WAS PROPERLY CONSIDERED BY THE JURY.

The VSC concluded that Trimiew never properly alleged or presented a theory of negligence that the Railroad failed to instruct him about the dangers of dismounting from a "high rail" vehicle into ungroomed ballast. The VSC erroneously states that "plaintiff did not present this theory of negligence at trial; there was no such allegation in the motion for judgment and there was no instruction that would have allowed the jury to make a finding against the defendant on this subject." Trimiew, 253 Va. at 29.

First, Trimiew fairly alleged failure to instruct by implication and inference from his general allegations of failure to warn and failure to provide a safe workplace. Virginia is a notice pleading state. VSC Rule 1:4 only requires a plain and simple statement of the claim.[3] Virginia's pleading rules and the FELA impose no duty on a plaintiff rail worker to set out all relevant facts in the complaint. Atchison, T & S.F.R. Co. v. Buell, 480 U.S. 557 (1987). Moreover, VSC Rule 3:16 provides that a

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[3] See infra, at 9, Statutes and Constitutional Provisions Involved In This Case section.

negligence allegation need not include any particulars of the negligence. Trimiew's suit, at paragraph seven (7), sufficiently asserted that the defendant "failed to provide plaintiff with a safe place to work...failed to inspect, find and warn plaintiff of a dangerous condition...failed to issue appropriate warnings, [and] violated [its] own standards as to the proper grooming and placement of ballast rock...." [App. at 17-18].

A failure to "warn" by logical implication includes a general failure to "instruct." To "warn" is to admonish or exhort as to action or conduct, to notify, advise or inform...to give authoritative or formal notice.... See Random House Dictionary of the English Language, 2d. Ed. (1987). The same dictionary defines "instruct" as "to furnish with information;...inform or apprise..." and defines "instruction" as the "act of furnishing with authoritative directions." Id. To apply a normal and intended meaning to a "warning" would, at the minimum, include "to instruct."

At trial Trimiew presented evidence of the failure to prevent the injury by advising and instructing him of the danger. [App. at 23-24, 111-14]. Trimiew also responded to defenses, such as contributory negligence, raised at trial, with evidence of inadequate training and instruction. [App. at 111-14]. If the general evidence serves dual "offensive" and "defensive" roles, then the "whole ball of wax" goes to the jury, where no objection to such evidence is made by the defendant and a general negligence instruction is provided. Cf. Union Pacific R.R. Co. v. Hadley, Ad'or, 246 U.S. 330, 332-33 (1918) (Holmes, J.) (Court may be justified in leaving general questions to the jury and not take the bundle apart and break the sticks separately). In fact, both Trimiew and the Railroad argued in closing arguments about training and instruction. [App. at 141-42, 145, 148-49]. No particularized negligence allegation instructions were presented to the jury, but rather general negligence instructions were granted. [App. at 161]. Further, a railroad

cannot force the worker to have the jury instructed on each constituent allegation of negligence, as opposed to a general negligence charge. See Hadley, 246 U.S. 330. Here, the trial court properly charged the jury on Trimiew's "safe place to work" allegations as well as with a general failure to "inspect" and take "precautions" instruction. [App. at 161].

Most importantly, the Railroad never objected to evidence or argument about these various negligence theories in closing argument, in the jury instructions, or at anytime during trial. The Railroad never even raised this issue on appeal to the VSC. The first claim that training or instruction was not properly presented to the jury was sua sponte by the VSC. The VSC cited no case to support its judgment that "training and instruction" was not valid evidence to support Trimiew's proof that the Railroad failed to provide a reasonably safe place to work, or of the Railroad's failure to warn Trimiew of the dangers along the track.

If this evidence was "improper," the Railroad was required to object at trial. Trimiew would have moved to amend his pleadings to conform to the evidence pursuant to Va. Code § 8.01-377. (See infra, at 9, Statutes and Constitutional Provisions Involved In This Case section). As there was no objection from the Railroad at any time, it is too late for this issue to serve as any basis for the Railroad to assert error or for the VSC to claim the evidence was not properly before the jury.[4]

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[4] The VSC's own Rule 5:25 requires that error not be assigned which is raised the first time on appeal. The Railroad's Petition for Appeal "Assignments of Error" to the VSC only asserted a lack of the Railroad's negligence and an excessive verdict. [App. at 174]. The appeal was accepted only on the issue of primary negligence of the Railroad.

CONCLUSION

Trimiew moves this Court to accept his Petition and Writ, and to summarily reverse and reinstate the jury verdict of the Richmond Circuit Court. The VSC's opinion is grounded on an improper and unlawful application of the doctrine of assumption of risk, which has been wholly obliterated under the FELA, as well as improper appellate review of a plaintiff's FELA verdict upheld by a trial court.

DATED this 8th day of April, 1997.

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